

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Edward LUKOWSKI Z-663 531

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2247

Edward LUKOWSKI

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 24 September 1979, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's documents for three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as Ship's Utilityman on board the United States SS B.T. SAN DIEGO under authority of the document above captioned, on or above 4 April 1979, while the vessel was moored in Port Angeles, Washington, Appellant assaulted Boatswain Theodore Levy.

The hearing was held at Long Beach, California, on 3 and 29 August and 24 September 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence two exhibits and the testimony of one witness.

In defense, Appellant offered in evidence his own testimony and that of two witnesses.

After the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification as alleged had been proved. He then served a written order on Appellant suspending all documents issued to him for a period of three months on twelve months' probation.

The entire decision was served on 29 October 1979. Appeal was timely filed on 27 September 1979. The notice of appeal referenced the memorandum of law submitted by Appellant's Counsel in support of the stated grounds for appeal. New counsel, Arnold Kessler, Esq., of Kessler, Drasin & Schwartz, represented the Appellant for the appeal and was provided a copy of the transcript. No brief, or

additional grounds for appeal, has been filed subsequent to the new counsel receiving the transcript. The appeal has been perfected by the reference to the original memorandum of law in the 25 September 1979 Notice of Appeal.

FINDINGS OF FACT

On 4 April 1979, Appellant was serving as a Ship's Utilityman on board the United States SS B.T. SAN DIEGO and acting under authority of his merchant mariner's document while the vessel was in the port of Port Angeles. As a Ship's Utilityman, Appellant worked some of his time under the Boatswain, who was a hard taskmaster.

On 4 April 1979, at about 2315, the Boatswain was walking down the dock to the ship's launch after returning from a two day absence when he noticed two men, the Appellant and another, stooped down behind a vehicle ahead. Prior to any recognition, the Boatswain stopped, apprehensive that they would rob him. The two men began to chase the Boatswain brandishing "2 x 4s" as clubs, while the man later identified as the Appellant said, "There's that nigger, let's get him". The Boatswain retreated until he had armed himself with a section of pipe, whereupon he turned to confront the attackers, now about five feet from him. Recognizing the two attackers, and that they were drunk, the Boatswain tossed aside his weapon and proceeded to the launch unafraid.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the actions of the Appellant were taken in self defense, and that in any event there was no assault because the Boatswain was not afraid of the Appellant

Appearance: Bernard Sacks Law Officer, San Francisco, California, by Thomas J. Boyle, Esq.

OPINION

I

Appellant's first ground for appeal, that his actions were taken in self defense, is unsupported by the evidence. The Administrative Law Judge found no competent, credible evidence in the record to support Appellant's allegation that he had a reasonable fear of the Boatswain such that he was justified in chasing the Boatswain with a 2 x 4 inch club in self defense. The Appellant sought to establish through his testimony alone that the

Boatswain's mere appearance on the dock where the launch departed for the ship, was a threat to his person justifying Appellant's actions. There is no basis in the record to indicate that the Administrative Law Judge erred in his evaluation of the conflicting testimony that Appellant was not acting in self defense. See Decision on Appeal 2115.

II

Appellant's second ground for appeal, that there was no assault upon the Boatswain because he did not fear the Appellant, is also without merit. Fear of the assailant is not an element of assault. When the Appellant chased the Boatswain with a club, the Boatswain fled because he was apprehensive of a battery. It was reasonable for the Administrative Law Judge to accept the Boatswain's testimony that he had retreated down the dock to seek safety by arming himself against a perceived attack by the Appellant. Moreover, the testimony of the Boatswain and that of Appellant agree that Appellant chased the Boatswain with a 2 x 4 inch club upon sight. Hence, I concur in the Administrative Law Judge's finding that an assault was committed by the Appellant.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that the Appellant did not act in self defense and that his actions were an assault upon the Boatswain constituting misconduct.

ORDER

The order of the Administrative Law Judge dated at Long Beach California, on 24 September 1979, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U.S. COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 3rd day of June 1981.